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Supreme Court of the United States

OCTOBER TERM, 1986

ALAN J. KARCHER,
as Speaker of the New Jersey General Assembly, *et al*,

Appellants,

—vs.—

JEFFREY MAY, individually, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF OF APPELLEES

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8 pp

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES i

ARGUMENT

I. THIS COURT'S DECISION IN *AGUILLARD* STRONGLY SUPPORTS THE JUDGMENT BELOW 1

CONCLUSION 6

TABLE OF AUTHORITIES

Cases:

PAGE

Corporation of Presiding Bishop v. Amos, 55 U.S.L.W. 5005 (June 24, 1987) 5

Edwards v. Aguillard, 55 U.S.L.W. 4860 (June 19, 1987) ..... *passim*

Lemon v. Kurtzman, 403 U.S. 602 (1971) 1, 3

Lynch v. Donnelly, 465 U.S. 668 (1984) 2

Wallace v. Jaffree, 472 U.S. 38 (1985) 2, 3, 4, 5

Pursuant to Supreme Court Rule 35.5, appellees file this Supplemental Brief in light of this Court's opinion in *Edwards v. Aguillard*, 55 U.S.L.W. 4860 (June 19, 1987), which was decided after the filing of appellees' principal brief.[1]

ARGUMENT

THIS COURT'S DECISION IN *AGUILLARD* STRONGLY SUPPORTS THE JUDGMENT BELOW

In *Aguillard*, this Court held that the Louisiana Creationism Act violated the Establishment Clause under the purpose prong of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). While the opinion in *Aguillard* did not alter preexisting law, it clarified several important questions concerning the proper analysis of legislative purpose.

Much of appellant's brief on the merits in this case is devoted to disputing the propriety of the district court's method of analyzing legislative purpose. *Aguillard* resolves such questions in favor of appellees and thus strongly supports the conclusion that New Jersey's minute of silence law is unconstitutional.[2]

First, *Aguillard* reinforces this Court's prior holdings that the purpose prong of the *Lemon* test is violated if a statute's "primary" or "preeminent" purpose is to endorse religion. 55 U.S.L.W. at 4863. That is precisely the standard applied by the district court below. Specifically, the district court found that the primary purpose of New Jersey's minute of silence law is

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1 Appellees continue to assert that Appellant Karcher has no standing to pursue this appeal and therefore that this appeal must be dismissed for want of jurisdiction. *See Brief of Appellees* ("App. Br."), at 6-12. This Court postponed further consideration of the question of jurisdiction to the hearing of the case on the merits. 93 L.Ed.2d 995 (1987).

2 The statute is cited in appellees' principal brief by its bill number, A-1064. This brief uses the same citation form.

"to introduce a mandatory time for prayer in the public schools." (J.S.A. 90a).[3]

Moreover, both the district court and Third Circuit found (J.S.A. 90a-91a; 27a-28a), as this Court found in *Aguillard*, 55 U.S.L.W. at 4862, that the state "identified no clear secular purpose for [its] Act." As noted in *Aguillard*, "[w]hen . . . 'both courts below are unable to discern an arguably valid secular purpose, this Court normally should hesitate to find one.' " 55 U.S.L.W. at 4866 (Powell, J., joined by O'Connor, J. concurring), quoting *Wallace v. Jaffree*, 472 U.S. 38, 66 (1985) (Powell, J. concurring); *accord*, 55 U.S.L.W. at 4868 (White, J., concurring).

Second, the Creationism Act in *Aguillard*, like the statute at issue in this case, involved state legislation aimed at elementary and secondary public schools. In *Aguillard*, this Court once again noted that the public school system presents a "special context" for Establishment Clause analysis:

> The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. . . . Students in such institutions are impressionable and their attendance is involuntary. The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure.

55 U.S.L.W. at 4861 (footnote and citations omitted).

Third, in order to determine the " 'actual purpose' " of the Creationism Act, *id.*, quoting *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring), the *Aguillard* Court examined the statute's legislative history and historical context, even though the Act itself explicitly stated a secular purpose—to protect academic freedom. The Court emphasized that, whatever the stated purpose, "it is required that the

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3 The lower court opinions in this case are set forth in the appendix to the jurisdictional statement, which is cited herein as "J.S.A."

statement of such purpose be sincere and not a sham." *Id.* at 4862, citing *Jaffree*, 472 U.S. at 64 (Powell, J., concurring); and 472 U.S. at 75 (O'Connor, J., concurring).

The New Jersey minute of silence law contains no stated secular purpose. Nevertheless, foreshadowing this Court's approach in *Aguillard*, the district court analyzed the postenactment rationale proffered by the legislature to determine if that purpose was in fact pretextual.

Furthermore, the district court's inquiry into purpose utilized the same sources later cited with approval by this Court in *Aguillard*. For example, *Aguillard* heavily relied on the statements of the chief legislative sponsor of the Creationism Act as part of its inquiry into the statute's purpose. 55 U.S.L.W. at 4862-63 & nn.13-14 (discussion of statements of Senator Bill Keith). Similarly, appellees presented undisputed evidence that Assemblyman Zangari, the chief sponsor of the New Jersey minute of silence law, was motivated by a desire to return prayer to the public schools. (J.S.A. 68a-70a). And like this Court in *Aguillard*, the district court also considered the religious motives of "several of the most vocal legislators," 55 U.S.L.W. at 4863 n.13, besides the chief legislative sponsor. (J.S.A. 70-71a).[4]

In short, *Aguillard* rejects the argument urged by appellants here and by the dissent in *Aguillard*, 55 U.S.L.W. at 4876 (Scalia, J., dissenting), that legislative purpose cannot be determined by examining the statements of a statute's leading proponents. Such an approach, as the dissent itself noted, would effectively eliminate *Lemon's* purpose prong. *Id.*

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4 The fact that the New Jersey legislature does not keep official records of its deliberations cannot distinguish this case from *Aguillard*. If that were so, legislatures could effectively immunize themselves from judicial scrutiny of actions taken with an unconstitutional purpose. Plaintiffs produced the best available evidence of the legislative history—evidence that went unrebutted by defendants and that was unquestionably reliable.

Fourth, the *Aguillard* Court rejected as irrelevant "post-enactment testimony of outside experts," *id.* at 4864, regarding the statute's actual purpose. Unlike the Creationism Act, the minute of silence law had no articulated secular purpose at the time of enactment. Only after litigation began did the legislature first articulate an arguably secular purpose and locate experts to make its point. As in *Aguillard*, this Court should find such postenactment testimony "of little use in determining the [New Jersey] legislature's purpose in enacting this statute." *Id.*; *see also Jaffree*, 472 U.S. at 57 n.45, and at 75 (O'Connor, J., concurring).

Fifth, this Court recognized in *Aguillard* that the Creationism Act was part and parcel of a struggle by certain religious groups to oppose, for religious reasons, the teaching of evolution. Accordingly, the Court traced the law's historical context not only within the Louisiana legislature, but by recognizing its link with actions in other states as well. 55 U.S.L.W. at 4863 & nn.9-10; *id.* at 4866 (Powell, J., joined by O'Connor, J., concurring).

In determining the "actual purpose" of the minute of silence law, the district court quite properly considered appellees' evidence setting out "the historical context of the statute, and the specific sequence of events leading to passage of the statute." 55 U.S.L.W. at 4864 (citations omitted). The court below examined the history of legislative attempts to defy this Court's school prayer decisions and recognized that A-1064 was simply the culmination of an historical effort to reintroduce prayer into the public schools. (J.S.A. 68a, 86a-87a).

Sixth, *Aguillard* establishes that a statute's "actual purpose" can often be discerned by examining its actual need. Here, appellees demonstrated that New Jersey teachers have long had the authority to impose periods of silence if necessary to achieve legitimate pedagogical goals, (J.S.A. 87a-89a),[5] and that there are no obstacles to students who wish to engage in

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5 *See also*, Statement of Governor Kean and predecessors (J.A. 383, 394-97).

silent prayer during the school day. *Id.* Thus, A-1064 was unnecessary to achieve either the transitional period ultimately advanced by the legislature as its asserted rationale, or the "accommodation" purpose that various amici now attribute to it.[6]

As this Court noted in *Aguillard* on a remarkably similar record:

> The Act does not grant teachers a flexibility that they did not already possess to supplant the present science curriculum with the presentation of theories, besides evolution, about the origins of life. . . The Act provides Louisiana schoolteachers with no new authority. Thus the stated purpose is not furthered by it.

55 U.S.L.W. at 4862, citing *Jaffree*, 472 U.S. at 59.

Here, as in *Aguillard*, the absence of any secular need for the statute strongly suggests that its "actual purpose" was to endorse religion in a manner prohibited by the Establishment Clause.[7]

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6 The "accommodation" rationale is raised for the first time before this Court. The legislature itself has explicitly rejected this as its purpose. *See* Juris. Statement at 21 n.10 (arguing that Third Circuit was wrong in attributing an accommodation purpose to A-1064). A rationale proffered four years after the fact by outside parties, and explicitly rejected by the Legislature itself is, at best, "of little use in determining the [New Jersey] legislature's purpose in enacting this statute." *Aguillard*, 55 U.S.L.W. at 4864.

7 The Court decided one other case under the Establishment Clause after appellees' brief was filed. *See Corporation of Presiding Bishop v. Amos*, 55 U.S.L.W. 5005 (June 24, 1987). In *Amos*, the Court found a permissible secular purpose of government neutrality and noninterference in private religious decision-making. *Id.* at 5008. Characterizing the statute in *Amos* as one that merely "allows churches to advance religion," the Court found no basis for the claim that "the *government itself* has advanced religion through its own activities and influence." *Id.* By contrast, the records in this case and *Aguillard* involve direct government efforts in support of religion without any secular purpose.

Assuming the Court reaches the merits of the present case, *Aguillard* reaffirms the propriety of the decision below.

CONCLUSION

For the reasons stated herein and in appellees' principal brief, the judgment below should be affirmed.

Respectfully submitted,

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